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Dear Human Resource Professionals, Managers, and Employees:

THE NEW (AND THE OLD) ADA

When the ADA first came out, we taught a lot of classes on the subject, but over the years as the courts interpreted the ADA it became apparent that it was very difficult for an employee to be covered and the ADA did not become a big problem for us. Amendments to the ADA, however, have as their goal the changing of the effect of some of those court decisions and we are going to have to pay more attention to the ADA as we go about our duties. The "new ADA" changes the effect of the court decisions by addressing in the law how the core definition of a covered disability is to be interpreted. The effective date is January 1, 2009.

Our focus in government has long been to get a person back to work and to that end we have sought to determine what we can do to accomplish that. Please see my newsletter of October 5, 2001 on gathering health information about employees. Because of our approach, I do not think that the new ADA will cause us too much trouble, as what is basically required by the ADA in order to allow a person to work is a reasonable accommodation, i.e. an attempt to get a person back to work.

Covered Disability

Under the new ADA a disability does not need to be a permanent condition, but otherwise the basic definition remains the same. It is a physical or mental impairment that substantially limits one or more major life activities; or a record of such impairment; or being regarded as having such an impairment. The ADA specifically requires that this definition be construed in favor of broad coverage of an individual.

Mitigating Measures

Before the new ADA, the effect of mitigating measures could be considered in determining whether a person had a covered disability. Examples of mitigating measures applied to physical or mental conditions are eyeglasses, medication, low vision devices, prosthetics, equipment, oxygen devices, hearing aids, assistive technology, learned behavior, and medical supplies. "Learned behavior" would occur when, for example, the mind of a person with one eye had subconsciously adapted so that his body compensated for the limitations of vision.

Under the new ADA, except for ordinary eyeglasses and contact lenses, no mitigating measures can be considered when evaluating whether a person has a covered disability. For example, if the person with an oxygen device could not walk without it, but can walk fine with it, then that person would be considered as having a covered disability. The reasonable accommodation, of course, might be to allow that person to wear the device while working.

Please don't scare yourself with a lot of "what ifs." We did that when the ADA first came out and all we accomplished was to unnecessarily scare ourselves. Just learn the basics and deal with each situation as it comes. And, importantly, always treat the person as you would want to be treated.

Major Life Activity

The new ADA is specific in identifying major life activities that must be substantially impaired and includes bodily functions as major life activities. The listings in the definition are said to be illustrative, i.e., "including but not limited to."

The listing of illustrative major life activities are caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

The listing of illustrative bodily functions to be considered as major life activities are functions of the immune system, digestive system, bowel, bladder, neurological system, brain, respiratory system, circulatory system, endocrine system, reproductive functions, and normal cell growth.

Remember, all we have to do is make a reasonable accommodation where there is a major life activity that is substantially limited.

Substantially Limits

The biggest practical change occurs with how this term is to be interpreted. The new ADA specifically rejects the finding of the Supreme Court that to be covered the person must have a condition that "prevents or severely restricts" the performance of a major life activity. Congress

in the new amendments says this is a "strict interpretation" that creates a "demanding" standard and that this approach was not intended by Congress when it initially enacted the ADA. It further states that the EEOC standard that "substantially limits" requires a "significant" restriction is "too high a standard." So, if we know we don't apply a strict interpretation of what an ADA covered disability is, and that we are not to use a demanding standard in making that determination, and that requiring a significant impairment is too high a standard, what standard do we use?

Congress tells us in the new ADA that the standard that we and the courts are to use is one that gives "broad coverage of individuals" and that is consistent with the findings and purposes of the new ADA. These findings and purposes are said to make the "primary object of attention" in these matters not an extensive analysis of whether the individual's condition is a covered disability, but whether entities have met their obligations under the ADA.

The way I read the effect of this from our perspective is that if a manager thinks a person has a physical or mental condition that is interfering to some degree with work performance, the person should be told of their substandard performance and asked if there is anything that can be done to help them perform better. If they answer in the negative, I would manage them as if they had no disability. If they say that there is something that can be done, the manager should get the help of an HR professional. Again, please, do not let your imagination make this more difficult than it is. Lazy is not going to be a covered disability. Nor is dumb. Let me illustrate what I think is going to be the practical effect of the new ADA with a real life case from the Federal Fifth Circuit.

An employee suffered degenerative disc disease and degenerative facet joint disease and was absent or tardy from time-to-time because of this condition. Also, during the day, if she was working on her feet she had to sit each hour for a few minutes, or, if she was working while sitting, she had to stand a few minutes each hour. Her employer fired her and she sought protection under the ADA. The court found that her condition was not a covered disability because she was "not significantly restricted as compared with the average person." Applying what I have discussed immediately above, under the new ADA I think the result will be different. I would also like to think that we would have tried to accommodate this person anyway.

Regarded as Having an Impairment

There is a significant change here that could potentially cause a bit of trouble. It used to be that a person asserting a claim under this part of the ADA had to show that the employer was motivated by the perception that the person suffered an impairment that substantially limited a major life activity. Now the person need only show that the employer thought the person had "an impairment." No showing of its impact is required. Wow, right? Frankly there is a bit of a conflict in the language of the ADA on this point and we are going to have to wait for guidance from the EEOC or from the courts before the scope of this provision can be fully defined.

Again, though, I think we will be okay because of our practices. That is, we all know that we make decisions based on merit and that we can articulate the merit reasons for our actions. You have heard me say that virtually anything can be done if there is a rational basis related to a governmental interest that can be articulated. Having a good business reason for an action and being able to show that reason goes a very long way in both avoiding and defeating a claim under any law. Keep following both this mantra, the advice given above, our past practices of working to get people back to work, and we will be okay.

Conclusion

All of the practices we have adopted for meeting the requirements of the ADA remain the same. If we just keep doing what we have been doing and remain aware of the changes covered here, we will be fine. We must seek to accommodate a disability as it is now defined, but our goal of doing what we have to do to get a person to work for us will take care of this. We may get sued more often while these new amendments get fleshed out, but as long as we remain aware of both our obligations under the law and of the need for a rational basis for the decisions we make, we will be fine.

There are not yet any new regulations covering the amendments. The ADA, itself, is at 42 USCA 12101, and following. The regulations, which will be amended in due course, are at 29 CFR Part 1630, Section 1930.2, and following. The law that made the amendments is PL 110-325 and makes excellent reading as it speaks of the reasons for the changes.

Sincerely,

s/Robert R. Boland, Jr.
General Counsel

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